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No. 90-1167

In The

Supreme Court of the United States

October Term, 1990

THE BOARD OF PUBLIC EDUCATION and ORPHANAGE FOR BIBB COUNTY, GEORGIA, et al.,

Petitioners,

versus

DAVID LUCAS, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, after petitioners changed a referendum from an election date with high black voter turnout to a date when voter turnout was expected to be low, the court of appeals correctly ruled that the combining of bond issues into one referendum question which forced minority voters supporting one project to either vote in favor of other projects they might not support, to abstain from voting, or to vote against the project they favored, was a standard, practice or procedure affecting voting that has the potential for abridgement of the right to vote on account of race under Section 2 of the Voting Right Act of 1965, 42 U.S.C. § 1973.

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents David Lucas, Willie Davis, Jr., Connie Cater, Corlis McKenzie and Ronnie T. Miley respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Eleventh Circuit's opinion which reversed and remanded for consideration, *inter alia*, of respondents' claim premised on Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

OPINIONS BELOW

The petition appendix does not contain the following opinions – the opinion of the district court denying respondents' first motion for preliminary injunction, reported at 686 F.Supp. 902 (M.D.Ga. 1988), appended hereto at 1A, and the opinion entered upon granting a stay pending appeal and enjoining the holding of the May 31, 1988 bond referendum election, reported at 486 U.S. 1301 (1988) (KENNEDY, J., in chambers), appended hereto at 7A.*

STATEMENT OF JURISDICTION

Petitioners assert jurisdiction in this Court under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioners, the Board of Public Education and Orphanage of Bibb County, Georgia (hereinafter "the Board") and related public officials of the county seek review of the determination by the U.S. Court of Appeals for the Eleventh Circuit that the form and structure of a

* Reference to the appendix hereto are "___A." References to the petition appendix are "___a." References to the record are to the record document number, *e.g.*, "R21."

referendum question may violate Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973.[1]

Proceedings Below. Respondents, black registered voters of Bibb County and plaintiffs below, instituted this action contending that the Board removed from the ballot a bond issue that black citizens favored (air conditioning for existing schools) and combined it with several other bond issues which black citizens opposed (mainly construction of a high school in a white neighborhood when there was space available in a majority black high school) and scheduled the referendum for a later, special election. The air conditioning issue was originally scheduled to be on the ballot on the March 8, 1988 presidential preference primary popularly known as Super Tuesday, an election at which high black voter turnout was expected and occurred, but the combined issues were scheduled for a special election at which no other item or races were on the ballot, on a day after a national holiday at which low voter turnout would be expected.

Respondents contended that the setting and changing of the election date and the removal of the one issue and combining it as one ballot question with others were "standards, practices or procedures" under the Voting Rights Act. The complaint was brought under Sections 2

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[1] Section 2 states in relevant part that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . "

and 5 of the Voting Rights Act of 1965, 42 U.S.C. §§ 1973 and 1973c, and the first, thirteenth, fourteenth and fifteenth amendments of the Constitution.

Respondents were successful in getting an injunction to stop the special election set for May 31, 1988. Special elections in Bibb County are required to receive preclearance under Section 5 of the Voting Rights Act. 28 CFR § 51.17 (1987). The Board did submit the special election to the Attorney General of the United States, but when the Attorney General requested additional information rather than preclearing the special election, the Board proceeded with plans to hold the election. Though the three-judge district court denied a preliminary injunction, ruling that the Attorney General's regulation designating special elections as covered changes under Section 5 was not authorized under the Act, the election was enjoined by the Circuit Justice. See appendix hereto, at 1A and 7A.

The Board rescheduled the bond referendum (with four bond issues combined into one ballot question) for the general election on November 8, 1988. Respondents unsuccessfully sought to enjoin the referendum at that election, again contending that the combining of issues required preclearance under Section 5. 38a. The three-judge district court entered judgment for the Board that the structure of the referendum question did not violate the preclearance requirement of Section 5. 44a. Respondents' appeal to this Court on the Section 5 issue was affirmed. 46a.

The single judge district court held subsequently that the form and structure of the referendum question was

not a standard, practice or procedure affecting voting under Section 2 and dismissed respondents' Section 2 claims. 17a *et seq.*[2]

On appeal to the Eleventh Circuit, the court of appeals reinstated the complaint holding that respondents did state a claim under Section 2. The Court rejected the Board's argument that this Court's summary affirmance on the Section 5 appeal foreclosed the claim under Section 2, stating that "because two reasons exist for the Supreme Court's affirmance, it did not *necessarily* decide the issue of whether the form of a bond referendum question is a standard, practice or procedure affecting voting." 9a. (Emphasis in original.) After examining cases of this Court and inferior courts under Sections 2 and 5, the court concluded respondents' claim was encompassed by Section 2. 9a-15a. It stated:

> How the Board presents projects to the voters, whether as single-issue or multiple-issue referendums, becomes a political decision with the potential for diluting or submerging the minority vote as prohibited by section 2. . . . By combining projects in one referendum, the Board forced minority voters supporting one project to either vote in favor of other projects they might not support, to abstain from voting, or to vote against the project they supported. Their political will to defeat certain propositions

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[2] The opinion only addressed Section 2, not mentioning respondents' constitutional claims. A judgment captioned "Final Judgment" was entered, R61, but by its terms it also covered only Section 2. The Court of appeals directed the district court to determine the status of the constitutional claims. 15a, n.7.

is effectively diluted or submerged by the combination of multiple projects in a single referendum.

13a. The court did not reach the merits of the claim but remanded for proceedings consistent with its opinion.

Facts Material to the Question Presented.

1. *The Referendum Form and Structure Decisions.* The Board had for several years considered a number of projects - one was the air conditioning of older buildings and another was the construction of a high school. On December 17, 1987 a black member of the Board, Robert Brown, moved to place the air conditioning bond referendum on the March 8, 1988, presidential primary (Super Tuesday) ballot.[3] Jesse Jackson's name would be on that ballot as it had been in 1984, which resulted in high black voter turnout (59%) compared to white voter turnout (37%). R48, p. 17; R58, p. 48. Four black members joined with one white member of the Board to adopt the motion. R4, p. 52. This decision was opposed by the county commission, which itself had previously placed a controversial one cent sales tax on the Super Tuesday ballot. R4, p. 57. The county commission had hired a consultant to help decide when to hold its sales tax referendum. R21 (Stipulation of Facts). The consultant studied turnout data for past elections, including the 1984 presidential primary, and recommended against having the school bond

[3] The county commission, not the Board, has the authority to call a referendum election, O.C.G.A. § 36-82-1, but as a practical matter the county commission, which is a party hereto, accedes to the Board's requests.

issue and the sales tax referendum together on the Super Tuesday ballot and reported:

> The presidential preference primary (Super Tuesday) to be held in March may attract large numbers of voters that are not prepared to cast an informed vote on the sales tax referendum.

Ibid., report of Kermit Keenum.

Three weeks after its original vote, the Board rescinded the motion calling for the air conditioning referendum, voting strictly on racial lines. R4, p. 57. It decided to consolidate the air conditioning issue and the school construction issue into one ballot question and to hold the election as a one-item special election the day after Memorial Day, despite the "possibility of a smaller voter turnout for a one-item vote." R4, p. 57. A second vote to separate the multiple issues into individual ballot questions was rejected strictly along racial lines. 3a, R-21, Board minutes of June 9, 1988, p. 3. The six white members followed the recommendation of the superintendent who strongly opposed dividing the issues. He recommended:

> In order to . . . structure a program which has the best chance of passing, . . . the Administration believes that we should keep the package together and try to get as many persons as possible who have an interest in any part of it to support it.

R21 (Stipulation of Facts).

2. *The School Bond Issues as Racially Divisive Issues.*[4] There was a difference between white and black voters in Bibb County on the referendum issues. As noted above, all black board members voted to separate the multiple issues into separate ballot questions. R-21. The Baptist Ministers Union/Evangelical Ministerial Alliance, composed of all black ministers in Macon, favored the air conditioning project but opposed the construction of the high school. The ministers issued a statement that they were "committed to supporting air conditioning for children," but urged voters to vote against the combined bond question. R23, p. 10. David Lucas, one of the respondents, a state representative for fourteen years with children in the public schools, along with other black citizens opposed the construction of a new high school believing that there was space available in a predominantly black high school and that the location of the proposed school in a white area would put the burden of bussing disproportionately on black students. R23, p. 9.

3. *Election Turnouts, Results and Racially Polarized Voting.* The combined bond referendum passed with 50.8% of the vote, a margin of 628 votes. White turnout was higher than black turnout, 71% of whites compared to 60% of blacks. At the originally scheduled Super Tuesday referendum date with Jesse Jackson's name on the

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[4] The following facts concerning racial division and polarized voting are in the record but are not set out as conclusive on these issues, for no trial has been held. Respondents set them out to illustrate how the timing of an election and the ballot format can be utilized to dilute minority voting strength.

ballot, black and white turnout were almost equal, 51% of blacks, 52% of whites. R48, p. 19.

Respondents presented an analysis of 15 elections in Bibb County between 1979 and 1988, including the school bond and sales tax referendums in 1988. Dr. Michael Binford conducted a regression analysis on those elections, the same procedure utilized in *Thornburg v. Gingles*, 478 U.S. 30 (1986).

In the twelve black/white elections plus the 1988 presidential general election, the correlation coefficient ("r") between votes and racial composition of the turnout was always between .91 and .99, 1.0 being a perfect correlation. The amount of variance ("r squared") explained by the correlation coefficient ranged from .84 to .99. R48, pp. 3 through 7. The table compiled by Binford on these races is reproduced at 12A, *infra*. Binford subsequently analyzed seventeen additional races in Macon and Bibb County between 1971 and 1988, and these buttressed his conclusion that "racially polarized voting exists in Bibb County." R58, p. 3.

The ecological regression estimates conducted by Binford showed that 66% of blacks voted against the combined bond referendum; 57% of whites voted for. R48, pp. 3-7. Thus a majority of each race voted on opposing sides, and the difference between the races in their support of (or opposition to) the referendum was 23%.

More voters of both races turned out in November, 1988 (when the school bond referendum was held) than in March, 1988 (Super Tuesday, the date of the originally scheduled air conditioning bond issue), but white voters

turned out at a much higher rate than blacks in November. Binford concluded that if black voters in November had matched the white turnout as they had in March, and the degree of polarity had continued as the ecological regression indicates, the referendum would have been narrowly defeated. R48, p.5.

REASONS FOR DENYING THE WRIT

I. The Opinion Below Reversing and Remanding for Consideration of Respondents' Section 2 Complaint is Not Ripe for Review.

This case is not ripe for review. No trial has been held and the court of appeals merely remanded the case for further proceedings.

Subsequent to a pre-trial conference, the district court ruled that the determination of "the number of questions to be submitted to the electorate for its approval or disapproval at the ballot box is not a voting standard, practice, or procedure" and denied respondents' claim under Section 2. 35a. The court of appeals found that a challenge to the form or structure of a referendum question can state a claim under Section 2, but appropriately did not reach the merits "because the district court did not rule on the 'results' aspects of this case." 15a. The case was remanded to the district court "for the determination of whether section 2 has been violated." *Ibid.*

It is not the usual practice of this Court to review a case prior to final judgment, when a court of appeals has

remanded, because the case is not ripe for review. *Brotherhood of Locomotive Fireman v. Bangor & Aroostook R.R.*, 389 U.S. 327 (1967); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251 (1916). Denial of review at this stage is appropriate here.

In addition, this case may yet be resolved below on factual grounds. Any need for this Court's review may be obviated by development of facts. The parties have never had a trial in which a finder of fact could explore the evidentiary bases for respondents' claims. The claims and defenses may present different issues when fleshed out with a full factual record. *Cf. U.S. Dept. of Labor v. Triplett*, ___ U.S. ___, 110 S.Ct. 1428 (1990). The courts below could rule for either petitioners or respondents in such a way as to obviate the question of interpretation of Section 2. If the findings are that no racial effects sufficient to violate Section 2 are present, the need to construe the coverage of Section 2 would not arise. Conversely, if invidiously discriminatory racial purpose and effect are found, respondents would prevail under their constitutional claims regardless of the scope of Section 2.

Review by the Court at this stage of the proceedings is simply premature.

II. The Court of Appeals Decided Section 2 of the Voting Rights Act Covers How Ballot Questions Are Presented, Not, As Petitioners Contend, What Issues May be Placed on Ballots.

The Board's first question presented, which contends the court of appeals' opinion allows voters "to challenge a policy decision of a school board as to what bond issues

to submit to the voters," Petition, (i), simply is not at issue in this case, was not decided by the court below, and is not presented here.

The Board's authority to decide on the propriety of projects and to submit those projects to voters for approval of bonded indebtedness is unaffected by this litigation. Nothing in this case even suggests that the Board may not present any and all projects to the voters. What respondents contend, and what the court of appeals decided respondents must be heard on, is that "the structure of the referendum question" requiring an all or nothing vote on racially divisive issues diluted minority voting strength. The complaint repeatedly uses the phrase "the structure of the referendum," Complaint, R1, ¶¶ 25, 28, 29, 30. It does not challenge the *substance* of the items to be placed on the ballot or the authority to place them on the ballot. It does challenge the Board's election decisions – how those items appear on the ballot and how votes are to be cast and counted for them.

The Board's argument that the court of appeals held voters have the right under Section 2 to place items up for referendum is of whole cloth. There is nothing to review on this point and this is not grounds for issuing the writ of certiorari.

III. The Holding of the Court of Appeals that the Structure of a Referendum Question is a "Standard, Practice or Procedure" Affecting Voting Under § 2 of the Voting Rights Act is Correct and Does Not Merit Review by this Court.

A. Section 2 Covers Practices Which Affect How Votes are Cast and The Decision to Have One Referendum Question on Separable Bond Issues Does Just That.

The court of appeals was correct in holding that the practice of combining separable referendum issues into a single question could, in some situations, "dilute a minority vote as effectively as anti-single shot voting procedures and straight ticket voting requirements." 15a. The anti-single shot and straight ticket comparisons are apt. Such laws compel voters to vote a full slate, thus casting ballots for those they do not support. *Dunston v. Scott*, 336 F.Supp. 206 (E.D.N.C. 1972) (3-judge court). Combining the bond issues here operated in the same manner. As reflected in the statement of the Baptist Ministers Union/ Evangelical Alliance, minority voters faced the choice of opposing a project they favored in order to vote against a project they opposed. Voters favoring all or none of the bond issues were able to cast a fully effective ballot. Those voters divided on the issues were not.

The Voting Rights Act was designed to cover all practices that affect voting, and referendum elections are included in the scope of the Act. The definition of voting for Section 2 is found in 42 U.S.C. § 1973*l*(c)(1):

> The terms "vote" or "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant

> to this subchapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office *and propositions for which votes are received in an election.*

(Emphasis added.)

This Court long ago recognized that the right to vote "can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). Congress recognized this in drafting the Voting Rights Act and defining "voting" broadly in the Act. *Allen v. State Board of Elections*, 393 U.S. 544, 565-66 (1969). From *Allen* to *Thornburg v. Gingles*, 478 U.S. 30 (1986), the broad scope of potentially discriminatory devices has been recognized.

The Senate Report accompanying the 1982 amendments to the Voting Rights Act states that Section 2 "also prohibits practices, which, while episodic and not involving permanent structural barriers, result in the denial of equal access to any phase of the electoral process for minority group members." S. Rep. No. 417, 97th Cong., 2d Sess., 30, reprinted in U.S. Code, Cong. & Admin. News 177 (1982). Consistent with the language of the Act and the legislative history, Section 2 has been applied to a range of election related practices. *Brown v. Dean*, 555 F.Supp. 502 (D.R.I. 1982) (polling place locations); *Harris v. Graddick*, 593 F.Supp. 128 (M.D.Ala. 1984) (appointment of poll officials). For examples of other practices held covered by Section 2 see cases collected at S. Rep. No. 417, 30, n. 119 and H. Rep. 227, 97th Cong., 1st Sess.,

14-17 (1981). A broad construction of Section 2 is consistent with this Court's opinion in *Thornburg v. Gingles*, 478 U.S. at 45, n. 10 ("Section 2 prohibits all forms of voting discrimination, not just vote dilution. S.Rep. at 30.")

B. The Board's Actions in Setting the Time of the Election and the Ballot Structure were Political/ Election Practices.

The Board's actions in setting the time of the referendum election and combining the bond issues into one question were political/election practice decisions. The Board was engaged in a political campaign and was structuring the election to enhance its chance of winning. There is nothing inherently sinister in this. This is what is expected of referendum proponents who control the timing of the election and the ballot format. But because election dates and ballot structure affect minority political participation, they are subject to challenge under Section 2.

The Board's own statements make clear the purely political aspect of its decisionmaking. *E.g.*, the superintendent's report, quoted *supra*, 7, on how to "structure a program which has the best chance of passing"; the consultant's report that the Super Tuesday primary "may attract large numbers of voters that are not prepared to cast an informed vote," quoted *supra*, 7. Even to this Court the Board argues the decision of the court of appeals will make it "virtually impossible . . . to forge the coalitions and compromises necessary to fund most projects." Petition, 9.

The timing and structure of a referendum are clearly "standards, practices or procedures" affecting voting. The court of appeals was correct in ruling that Section 2 of the Voting Rights Act proscribes their manipulation in a manner that dilutes minority voting strength.

C. The Evidence in This Record Illustrates How Referendum Timing and Structure Can Dilute Minority Voting Strength to Come Within Section 2.

Respondents have set out in their statement of the case some of the facts illustrating how the manipulation of the ballot timing and structure can dilute minority voting strength.

When Robert Brown and the other black Board members voted to put the air conditioning issue on the 1988 Super Tuesday ballot, they knew Jesse Jackson would be on the ballot and a high black voter turnout was expected. When petitioners removed the referendum from Super Tuesday, they had studied the voter turnout at the 1984 presidential preference primary, at which blacks had turned out at a much higher rate than whites. The Board then picked an election day which was expected to result in low turnout. The November election date at which the referendum was finally held resulted in whites having an advantage, by virtue of high white voter turnout, they did not have in the March election.

The Board's decision to combine the air conditioning and high school construction into one ballot question was made at a time when it knew that black voters supported the air conditioning and that there was substantial black

voter opposition to the school construction. The decision to combine the questions was specifically made to affect how people voted, to diminish voting against the school construction.

The referendum results were racially polarized despite the Board's efforts to minimize black voters' opposition to the school construction. Though the vote on the referendum was not as polarized as other votes in Bibb County, 12A, the facts that the majority of black and white voters cast their votes on opposite sides and that the spread between black and white voter support or opposition was 23% strikingly illustrate that the referendum issues were racially divisive. Further, the closeness of the vote and the different turnouts between March and November, coupled with the racial polarization, indicates the manipulation of the date and ballot question affected the outcome of the election. The referendum carried though 66% of minority voters opposed it, and the evidence in the record strongly indicates the results would have been different if the original election date had been used. This case presents a classic instance of dilution of the minority vote.

The court of appeals was correct in holding the Board's actions were encompassed by Section 2 of the Voting Rights Act. The decision below is consistent with the language and legislative history of the Act, and plenary review is not warranted.

D. The Court of Appeals Correctly Adhered to the Law That Summary Affirmances are Binding on Lower Courts.

In the Section 5 part of this case, this Court summarily affirmed the judgment of the three judge district

court that the decision to combine the bond issues into one referendum question did not violate Section 5 of the Voting Rights Act for failure to receive preclearance. 44a, 46a. Petitioners urge review contending that the court of appeals' decision is in direct conflict with this summary affirmance. Petition, 13.

To the contrary, the court of appeals correctly acknowledged that all inferior courts are bound by any question necessarily decided by a summary affirmance by this Court. 7a. The court also correctly decided that the summary affirmance could have been based on one of two rationales – that the Board's action was not a change in voting practices because it was authorized by statutes pre-existing the effective date of the Act, or that it was not a voting practice. 9a.[5]

The argument in this section demonstrates that the court of appeals' decision – that the Board's actions were standards, practices or procedures affecting voting within the meaning of Section 2 – was correct and plenary review by this Court is not warranted.

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[5] There is nothing that "defies reason," Petition, 13, in a voting practice exempt from Section 5, either because it was authorized by law in effect prior to the date of coverage or was actually precleared, being subject to challenge under Section 2. *See, Thornburg v. Gingles, supra,* finding a legislative reapportionment in violation of Section 2 which had been previously precleared under Section 5.

IV. This Litigation Presents a Unique Set of Facts. Similar Issues Will Seldom Arise or Be Capable of Proof, and Therefore Review by this Court is Not Merited.

The facts underlying this litigation are unique, both as a matter of occurrence and of availability of proof of racial purpose and effect. Seldom will there be recorded evidence of the decision to place a ballot issue on a date on which blacks would be expected to turn out in relatively high numbers, that public officials would rescind that decision and attempt to move the referendum to a day after a national holiday with expected low turnout, that black and white citizens would be divided over referendum proposals in the same election, that proponents' motivations in structuring the election would be contemporaneously recorded, that the ultimate vote would be so close and so racially polarized that proof is available not merely of minority vote dilution, but that the outcome of the election would have been different absent the dilution.

Similar litigation will seldom arise such that there is a need for plenary review, and as the court of appeals noted, its "holdings do not have any far reaching impact on the manner in which public bodies in Georgia may offer propositions to the voters." 15a.

CONCLUSION

For the foregoing reasons, respondents suggest that the petition for writ of certiorari be denied.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

C.A. 88-166-1-MAC (WDO)

[Filed May 27, 1988]

[686 F.Supp. 902]

DAVID LUCAS, et al.,
Plaintiffs,
vs.
JUDY TOWNSEND, et al.,
Defendants.

OWENS, District Judge

Plaintiffs in their complaint filed this 27th day of May at 2:20 P.M. contend that the Tuesday, May 31, 1988, bond referendum election to be held in Bibb County, Georgia, should be temporarily restrained by the receiving single district judge and preliminarily enjoined by the court of three judges – Circuit Judge James C. Hill, District Judge Duross Fitzpatrick and Chief District Judge Wilbur D. Owens, Jr., appointed this date by Chief Circuit Judge Paul Roney pursuant to 28 U.S.C. 2284(b) – because it is being held in violation of Section Five of the Voting Rights Act, 42 U.S.C. 1973(c).

Plaintiffs' motion for a temporary restraining order came on to be heard before the receiving single judge who heard evidence and argument from plaintiffs and defendants. At the conclusion of the hearing the parties were asked if they desired a further hearing preceding

the scheduled election before the court of three judges. All parties responded that if such a hearing were held, they would present nothing other than what was presented this afternoon so that it is agreeable with all for the court of three judges to decide this controversy on the basis of all that was presented to and heard by the receiving single district judge. Accordingly, the court of three judges conferred by telephone, carefully considered the contentions of the parties and decided as follows:

> Section Five of the Act, 42 U.S.C.A. § 1973c, provides that whenever a covered state or political subdivision "shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964 . . ." it may not utilize or implement such change until (a) it has secured a judicial determination in the U.S. District Court for the District of Columbia that the change does not have the purpose or effect of denying the right to vote on account of race or (b) it has submitted such change to the Attorney General of the United States and the Attorney General has not interposed an objection within sixty days. While the Act does not specifically provide for a remedy for failure to comply with Section Five, the Supreme Court has held that a complaint for injunctive relief to be heard by a district court of three judges may be filed in any U.S. District Court and that court if it is shown that Section Five applies must enjoin the utilization or implementation of such change until Section Five is complied with. *Allen v. Board of Elections*, 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed. 2d 1 (1969).
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> * * *

> This district court of three judges is required to resolve any dispute as to the coverage of Section Five or, said more directly, to determine "whether such changes have the potential for diluting the value of the Negro vote and are within the definitional terms of § 5." *Georgia v. United States*, 411 U.S. 526, 534, 93 S.Ct. 1702, 1707, 36 L.Ed.2d 472, 481 (1973). The question of coverage to be decided by this court does not include the ultimate question required by Section Five to be presented to the District Court for the District of Columbia or the Attorney General, i.e., whether or not the enactment in truth and fact has a discriminatory purpose or effect. *Perkins v. Matthews*, 400 U.S. 379, 383, 91 S.Ct. 431, 434, 27 L.Ed.2d 476, 482 (1971).

Plaintiffs contend that the school bond referendum scheduled for May 31, 1988, constitutes a "change," as that term has been defined under 42 U.S.C. § 1973c, and therefore, the bond referendum cannot be held on that date absent preclearance from the Attorney General's office. Plaintiffs support this position by citing the court to 28 C.F.R. § 51.17. This section provides in relevant part:

> (a) The conduct of a special election (e.g., an election to fill a vacancy; an initiative, referendum, or recall election; or a bond issue election) is subject to the preclearance requirement to the extent that the jurisdiction makes changes in the practices or procedures to be followed.
>
> (b) Any discretionary setting of the date for a special election or scheduling of events leading up to or following a special election is subject to the preclearance requirement.

Plaintiffs have also presented evidence that the Attorney General, has, in fact, refused to preclear the May 31st,

1988, election date[1] because he had not been provided with sufficient data to make an informed decision on the subject. Based upon these facts, and without any more evidence, plaintiffs assert that Section Five is implicated because the election, as scheduled, is a "change," and that it has the "*potential* for diluting the value of the Negro vote." *See Georgia v. United States*, 411 U.S. at 534 (emphasis added).

Plaintiffs have presented no evidence, however, that the standard, practice, or procedure for scheduling bond referendums presently being utilized in this state is any different from that in force or effect when the Voting Rights Act was adopted and/or extended. Even assuming that such is the case, the evidence presented before this Court has utterly failed to demonstrate that the holding of the bond referendum on May 31st, 1988, has even the potential for diluting the minority vote. Plaintiffs' argument is that there would be an adverse effect with regard to voting by minorities if a bond referendum, such as the one at issue, is conducted on a date other than the date of a statewide or national election. As the argument goes, this would be necessary in order to insure a large black voter turnout. We are aware of nothing in Section Five jurisprudence which requires such a result. There is no reason to suspect that blacks or whites will turn out in greater or less numbers in proportion to each other if the election is conducted at a time when only one issue is put before the voters, as opposed to a date when other issues

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[1] Defendants have made an effort to comply with the Attorney General's regulations, however, their compliance was done under protest.

or races are pending. To find to the contrary would, in effect, restrict all special elections to being held at the time of a general primary or general election, and would entirely negate the purpose of having a special election law in the first place. Plaintiffs have presented no evidence to refute such a conclusion. Plaintiffs have cited the court to the Eleventh [*sic* Fifth] Circuit's decision in *Garcia v. Guerra*, 744 F.2d 1159 (11th [5th] Cir. 1984), however, this case is not controlling because the "change" therein clearly implicated the migrant farmworkers' ability to participate in the planned election.

While the court recognizes that the Attorney General plays a central role in formulating and implementing Section Five, and that his interpretation of the scope of this section is entitled to particular deference, the ultimate determination of whether a change is covered by Section Five is reserved for a three-judge panel in the local district court. *See Allen v. Board of Elections*, 393 U.S. 544, 562-63 (1969); and *Garcia*, 744 F.2d at 1163. The Attorney General's regulation making all discretionary special elections subject to Section Five's coverage is simply not supported by the language found in 42 U.S.C. § 1973c. The electoral action involved must constitute a genuine change from past practices, and further it must have, at minimum, the potential for discrimination. The facts as presented herein, do not demonstrate these requirements.

Accordingly, because plaintiffs have failed to present any evidence that the school bond referendum scheduled for May 31st, 1988, is a cognizable "change" under Section Five of the Voting Rights Act, and that the election will in some way discriminate against minority voters,

the court must and does hereby DENY plaintiffs' prayer for preliminary injunctive relief.

For the Court of three Judges, this 27th day of May, 1988.

/s/ Wilbur D. Owens, Jr.
Wilbur D. Owens, Jr.
Chief United States
District Judge
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[108 S.Ct. 1763]

IN THE SUPREME COURT OF THE UNITED STATES

LUCAS ET AL. *v.* TOWNSEND ET AL.

No. A-898

JUSTICE KENNEDY, Circuit Justice.

This is an application to enjoin a bond referendum election scheduled for May 31, 1988, in Bibb County, Georgia. The applicants are five black citizens registered to vote in Bibb County. On May 27, 1988, a three-judge District Court for the Middle District of Georgia declined to issue an injunction, concluding that the applicants had failed to establish that holding the election now contemplated would violate Section 5 of the Voting Rights Act, 79 Stat., as amended, 42 U.S.C. § 1973c. The United States has submitted, and I have reviewed, a memorandum advising me that it supports the applicants' request for immediate injunctive relief. I have also reviewed and considered a submission by appellees in opposition.

I

On December 17, 1987, the Bibb County Board of Education resolved to place a bond referendum on the March 8, 1988 ballot, a primary election date popularly known as "Super Tuesday." The bond issue was intended to help defray the cost of air conditioning certain local schools. The Board subsequently voted, on January 4, 1988, to rescind its prior resolution. It resolved to postpone the referendum until May 31, 1988, when it would

be voted on with a second bond issue for the building of a new high school.

On March 7, 1988, counsel for the applicants requested the Board to rescind its vote calling for the May 31 referendum. In his letter to the Board, counsel argued that changing the date of the election from a primary day would adversely affect minority voter turnout. The letter also argued that the two bond issues had been combined in an effort to manipulate the minority vote, and noted that the call for the May 31 referendum had not yet been submitted for preclearance to the Voting Section of the United States Department of Justice.

On March 30, 1988, the State authorities applied to the Voting Section of the Civil Rights Division of the Department of Justice for preclearance. On May 25, 1988, the Civil Rights Division responded that "the information sent is insufficient to enable us to determine that the proposed change does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color," and asked for additional information, including a "detailed explanation of the reason for choosing May 31, 1988, as the bond election date."

The Division also requested that State authorities respond to allegations (i) that the Super Tuesday date had been abandoned because the turnout of black voters was expected to be high on that date, and (ii) that the two bond issues were consolidated to prevent black voters from voting separately on each of the proposed projects. Finally, the Division noted that the Attorney General has 60 days to consider a completed submission, and that the

period would begin to run upon receipt by the Division of all necessary information.

Applicants sought an injunction prohibiting the Board from holding the election on the ground that the election had not been precleared by the Attorney General in accordance with Section 5. On May 27, 1988, the three-judge court denied the request for an injunction. The court stated that it was required to determine whether the actions proposed "have the potential for diluting the value of the Negro vote and are within the definitional terms of § 5." Opinion, at 3, quoting *Georgia v. United States*, 411 U.S. 526, 534 (1976). It also adverted to the Attorney General's regulation providing that any discretionary setting of the date for a special election, which is defined to include a referendum, is subject to the preclearance requirement, 28 CFR § 51.17 (1987), and acknowledged that the Attorney General had not precleared the referendum.

The court concluded that the applicants had failed to present evidence that the procedures to be utilized in the upcoming election differ from those in use at the time the Act became law. Accordingly, it concluded that the referendum was not a "change" covered by Section 5. While the court noted that the Attorney General's regulation provides otherwise, it held that the regulation is not supported by the language of Section 5. Alternatively, the court concluded that plaintiffs had failed to show that holding the referendum on May 31, 1988, "has even the potential for diluting the minority vote." Opinion, at 4-5. Accordingly, the court declined to issue the injunction prayed for by the applicants. This application followed.

II

The principles that control a Circuit Justice's consideration of in-chambers applications for equitable relief are well settled. As a threshold consideration, it must be established that four members of the Court will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction. See *White v. Florida*, 458 U.S. 1301, 1302 (1982) (Powell, J., in chambers); *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers). I must also be persuaded that there is a fair prospect that five Justices will conclude that the case was erroneously decided below. See, *e.g.*, *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972). Finally, an applicant must demonstrate that irreparable harm will likely result from the denial of equitable relief and, in appropriate cases, a Circuit Justice will balance the equities to determine whether the injury asserted by the applicant outweighs the harm to other parties or to the public. See *Rostker v. Goldberg*, *supra*, at 1308; *Times Picayune Publishing Corp. v. Schulingkamp*, 419 U.S. 1301, 1304 (1974) (Powell, J., in chambers).

The substantiality of the federal questions presented by the case cannot be doubted. Section 5 provides that certain jurisdictions, including the one in which this case arose, may not implement any election practices different from those in force on November 1, 1964, without first obtaining approval from the United States District Court for the District of Columbia or, alternatively, from the Attorney General. Neither statutory requirement has been met in this case. The three-judge court concluded, however, that the discretionary setting of the date of a special election is not a "change" covered by the statute,

notwithstanding the provision in 28 CFR § 51.17 to the contrary. The conclusion is most problematic under our precedents, see, *e.g.*, *NAACP v. Hampton County Election Commission*, 470 U.S. 166, 178 (1985) (noting that it could not seriously be disputed "that a change in the date of an election, if effected by statute, requires approval by the Attorney General under § 5"), and I have concluded that four members of the Court would likely vote to note probable jurisdiction and that there is a fair prospect that the Court would vote to reverse the judgment below.

I am further persuaded that irreparable harm likely would flow from a denial of injunctive relief. Permitting the election to go forward would place the burdens of inertia and litigation delay on those whom the statute was intended to protect, despite their obvious diligence in seeking an adjudication of their rights prior to the election. Even if the election is subsequently invalidated, the effect on both applicants and defendants likely would be most disruptive. Further, although an injunction would doubtless place certain burdens on defendants, such burdens can fairly be ascribed to the defendants' own failure to seek preclearance sufficiently in advance of the date chosen for the election. On balance, I conclude that the equities favor the applicants. Today I have entered an order enjoining the election, pending the timely docketing of an appeal.

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[Source: Affidavit of Michael Binford, R48, pp. 6-7]

Bibb County, Georgia

	r	R2	100% White	100% black
Jackson 1984	.99	.99	3%	69%
Jackson 1988	.99	.98	12%	104%
Sales Tax (No)	.68	.46	53%	71%
Dukakis 1988	.98	.95	30%	101%
Bonds (No)	.66	.44	43%	66%
Adams, 1986 primary	.98	.96	18%	91%
Hudson, 1986 primary	.95	.90	13%	83%
Adams, 1986 run-off	.93	.87	23%	103%
Harvey/Hill 1987 primary	.91	.84	56%	98%
Brooks, 1987 primary	.99	.99	17%	93%
Lucas, 1987 primary	.99	.99	16%	97%
Dillard/Huff 1987 primary	.98	.97	36%	95%
Brooks, 1987 general	.99	.98	39%	94%

Lucas, 1987 general	.99	.99	8%	96%
Brooks, 1979 primary	.99	.97	25%	93%

The first column reports the correlation coefficient between the votes and racial composition of the precinct. The second column indicates the amount of variance explained by the correlation. The third and fourth columns present the estimates from the regression equations for the percentage of vote that would be given to a candidate in homogeneous white and black precincts.